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A Guide to Alberta Public Land Law

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1.0 Introduction

What do we think of when we hear the term "public lands"? Maybe, as urban dwellers we think about our experience visiting provincial and federal parks? This includes water, forest, wildlife, and other recreational uses. If we live in the country or in smaller centers, we may think about public lands used for agriculture, particularly farming and grazing. Wherever we live, we are aware of the higher profile oil and gas, timber and consumptive water uses on public lands. We may not be aware that Provincial public lands comprise 60% of Alberta's area, while 10 % are federal public lands. Public lands make up 89% of Canada as a whole.

Public lands include the majority of Alberta's natural resource endowment: oil and gas, forests, water, wildlife, mines and minerals, parks and protected areas, and grazing and agricultural land. These are lands owned by and constitutionally vested in Alberta and in the other provinces. The *Constitution Act, 1867*[1] refers to "…all Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada…". Yet these lands as a whole and their use, sale and management are largely below most Albertans' radar.

But some public lands issues have been the subject of public controversy. In 2017 Alberta citizens demonstrated against government plans to sell provincial park lands. "Defend Alberta Parks", "Protect OUR water" and "Save our Forests" signs sprouted on suburban lawns. Members of an Ontario based rock band called "Crown Lands" explained that the name refers to "reclaiming stolen lands".

This guide is intended to raise public awareness about public lands, highlight their current significance, how they are managed, and improve public knowledge about public lands' nature, history, and legal framework. The guide is not comprehensive. It is aimed at the general public as well as at specialists in law and related disciplines. It should provide information to enhance public participation and involvement in public lands decisions and transactions.

More specifically, focus will be on the Alberta *Public Lands Act* and related legislation as well as public decision-making agencies. Attention will be given to public lands and natural resources other than oil and gas. Particular attention will be paid to what rights and opportunities members of the public have, to buy or use public lands, and to participate in decisions concerning these public resources. The Guide ends with review of a series of legal conflicts concerning Alberta public lands.

To begin the discussion, it is pertinent to explain what constitutes public lands.

1.1 What are Public or Crown Lands?

Alberta public lands are "lands of the Crown in right of Alberta";[2] they include land surface, mines or minerals, water, and rights to use water, wildlife, fish, and beds and shores of rivers, lakes and

[1] U.K. 30 & 31 Victoria, c. 3, s. 109.
[2] *Public Lands Act,* RSA 2000 c. P-40, s. 2(p). (PLA).

waterbodies.[3] Similarly, public lands, such as national parks, may be held by the federal government. In some respect, they are managed by a public or shared governance entity created by law.[4] Municipal lands may also be seen as public lands, although they may not be Crown lands. In short, public lands are non-private lands held and managed by a federal, provincial, or municipal Crown agent or institution.[5]

When the term "public land" was adopted in the 1970s in place of "Crown Land" with reference to lands administered under the *Alberta Public Lands Act* (PLA),[6] it was considered necessary to eliminate the tendency of confusing federal Crown land and provincially owned lands. Nevertheless, the term "public lands" was used in the 1990s to describe lands held in the public interest.[7] However in Alberta government usage today, "public lands" normally excludes federal "Crown" land. The PLA (the Act) only applies to land under the administration of the Minister appointed by regulation, currently the Minister of Environment and Protected Areas. Therefore, public lands in the government of Alberta usage refers normally to land administered by the Department of Environment and Protected Areas and usually does not include lands administered by other Alberta departments.[8] However, the PLA refers to "public land" as "land of the Crown in right of Alberta".[9] This would, for example, include lands under the *Forests Act* currently administered by the Minister of Forests and Parks.

The next three sections trace the story of Canadian public lands, from Indigenous occupation and use, through European exploration and settlement, to Alberta public lands as they exist today. These public lands are placed in the Canadian constitutional context, and their management and disposition under the Alberta *Public Lands Act* is reviewed. Section four focusses on public land planning and management theory and practice. Finally, in section 5, the focus narrows to decisions concerning public lands, particularly dispositions and sales, approvals, appeals, judicial review and regulatory enforcement. Section six looks at selected public land and resource use conflicts.

2.0 A Brief History of Alberta Public Lands

The story begins with ice age indigenous migrants moving across Behring Strait and southward in what became North America. At least, this is one theory.[10] European exploration is generally thought to have begun with Scandinavian Vikings in the late 900s and continued with Western European voyages in the late 1400s.[11]

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3 Elaine Hughes, Arlene Kwasniak, and Alastair Lucas, *Public Lands and Natural Resources Law in Canada*, (Toronto: Irwin Law, 2016) at 1 (Hughes).
4 Arlene Kwasniak, *A Legal Guide to Non-Private Lands in Alberta,* (Calgary: Canadian Institute of Resources Law, 2015) at 22 (Kwasniak).
5 *Ibid* at 8.
6 PLA*, supra* note 2.
7 Government of Alberta, "History of Public Lands in Alberta" (April 1, 2017) at 1.
8 *Ibid* at 2.
9 PLA*, supra* note 2, s 1 (p).
10 Hughes, *supra* note 3 at 11-12.
11 *Ibid* at 15-16.

2.1 What the European Explorers Found[12]

The early Europeans were funded initially by European sovereigns and benefactors, and later by aristocrats and corporate entities – particularly trading companies under royal charter. They operated under some form of discovery doctrine. These new lands were claimed for sovereigns.

However, the early explorers quickly discovered that these new lands were not vacant. They were and had for thousands of years been occupied and used by groups of Indigenous people. These early North Americans spread widely over the continent. The earliest groups are thought to have been hunters who developed distinctive lifestyles based on particular geography, wildlife, and wildlife habitat. This included hunting caribou in Eastern and Northern regions, buffalo on the western plains of what is now Canada, as well as east and west coast fishing in particular areas. Later, some groups practiced small area farming.

These groups spoke a variety of languages, and adopted distinctive means of subsistence, cultural practices, traditions, and customs over several thousand years of settlement history.

2.2 European Conquest, Colonization, and Settlement

Under the broadly accepted international doctrine of "reception" - when a colony was settled, it adopted the law of its colonizer.[13] When a colony was conquered or ceded, existing law continued to apply until replaced or modified by legislation. However, most scholars agree that this settlement regime was not applied to preexisting Indigenous lands because the Indigenous people were not conquered, nor did they cede their lands.[14] Hudson's Bay Company ownership of a huge area draining into Hudson's Bay was created on May 2, 1670, by Royal Charter.[15]

After the Seven Years War, in which the Huron Nation fought on the French side, the latter, under the 1763 Treaty of Paris, ceded their North American territories to the victorious British. The result was that British common law applied; though in Quebec, the British agreed to continue French civil law in force.

For the Indigenous peoples, The Royal Proclamation of 1763 specified that they should not be disturbed, and there should be no private land sales unless Indigenous land was acquired by the Crown. Thus, a form of title to these unceded lands was recognized, and a process for "surrender" of Indigenous land by means of treaty was established.[16] In principle, a nation-to-nation relationship was recognized at this early stage of Canada's history.

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[12] This section is based on Hughes, *supra* note 3 at 14-16.
[13] *Ibid* at 17-18.
[14] *Haida Nation v. British Columbia*, 2004 SCC 73 at para 25.
[15] See Hughes, *supra* note 3 at 34-36; and section 2.5 below.
[16] *Ibid,* at 20-21.

Indigenous nations played a significant part on both British and American sides during the War of 1812. In the post-war negotiations, a serious option discussed was a Great Lakes area "buffer - zone" – a form of independent Indigenous nation. However, this never materialized.[17]

2.3 After Confederation

Political negotiations toward Canadian Confederation culminated with passage by the British Parliament of the *British North America Act, 1867* (BNA Act). This was Canada's founding constitution. It divided powers over public lands between the federal Parliament and the Provincial Legislatures in two ways: first, there are legislative powers - the powers to enact laws. Second, there is ownership (as distinct from legislative power) of public lands by federal and provincial governments. The following describes the federal and provincial public lands legislative powers.

2.3.1. Federal Powers[18]

Main exclusive **functional federal powers** under s. 91 of the BNA Act that relate to actions concerning federal and provincial public lands include: "Navigation and Shipping" (s. 91 (10)), "Sea Coast and Inland Fisheries" (s. 91 (12)), "Canals, Harbours, Rivers and Lake Improvements" (s. 108), and "Federal Works and Undertakings" such as interprovincial and international pipelines, plus works and undertakings specifically declared to be "for the general advantage" of Canada, or two or more provinces (ss. 92 (10), (29)).

Exclusive **Conceptual powers** give Parliament power under certain broadly framed subjects that may relate to public lands. These include "Criminal Law" (s. 91 (27)), "Taxation" (s. 91 (3))," "Trade and Commerce" (s. 91 (2)), "The Public Debt and Property" (including the "Spending Power", (s. 91 (1A)), and the residual "Peace, Order and Good Government" power (s. 91(opening words) and s. 29).

2.3.2 Provincial Powers[19]

Provinces may legislate exclusively in relation to: "Management and Sale of Public Lands belonging to the Province and of the timber and wood thereon" (s. 92 (5)), "Local Works and Undertakings" (s. 92 (10)), "Property and Civil Rights in the Province" (s. 92 (13)), "Matters of a merely local or private Nature" (s. 92 (16)), "penalties… for enforcing any law of the Province…" (s. 92(15)), "Exploration … development, conservation and management…", and subject to conflicting federal legislation, export to other provinces and taxation of non-renewable natural resources and electrical energy (s. 92A).

As to public property ownership, section 109 of the BNA Act states:

[17] *Ibid, at* 22-23.
[18] Alastair R. Lucas, 'Constitutional Jurisdiction', citing P. Muldoon and B. Rutherford, *Environment, and the Constitution*, in William A. Tilleman *et al* (Eds), *Environmental Law and Policy*, 4th ed 2020 at 256.
[19] Hughes, *supra* note 3 at 54-55.

> **109** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

The constitutional founders may have included s. 109 to give the provinces a source of operating revenue.[20] Provinces such as Alberta that joined confederation later were also granted the benefits of section 109 (section 2.6 below). It is important to note that while this section authorizes provinces to deal with their lands, mines, and minerals as owners, it does not confer legislative jurisdiction *per se*.[21]

2.4 Federal-Provincial Conflicts

Federal-provincial jurisdiction conflicts are resolved either by agreement[22] or by courts. The judges first use established (but not completely settled) interpretive rules to determine the "pith and substance" (essential subject matter) of each statutory provision in question. Secondly, they decide under which federal or provincial legislative power the subject matter falls. Hughes uses the example of a provincial law that prohibits timber imports into a province. Is this in essence a matter of regulating property and thus under sections 92 (13), (5) and 92A (above); or is it really about regulation of trade and commerce? (s.91(2)).[23]

Another example would be whether a federal excise tax on natural gas produced in Alberta by the Alberta government and exported to the US is a matter of "property and civil rights" (s. 92 (13)), "all matters of a local or private nature in the province" (s. 92 (16)), (perhaps) provincial property ownership jurisdiction, management and sale of public lands in the province (s. 92 (5)), local works or undertakings (s. 92 (10)), or the exploration, development, management of non-renewable natural resources (s. 92A)); or is it in essence a matter of federal trade and commerce (s. 91(2)), taxation (s. 91 (3)), and perhaps other broader federal powers such as peace, order and good government? The Supreme Court of Canada held[24] that the subject matter in question was a federal tax. This could not apply to natural gas owned and produced for export by the Alberta government because it contravened the reciprocal land and property tax immunity created by s. 125 of the Constitution Act, 1867.

2.5 Expanding Public Lands

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[20] *See Re Exported Natural Gas,* [1982] 1SCR 1004, Opinion of MARTLAND, RITCHIE, DICKSON, BEETZ, ESTEY AND CHOUINARD JJ, Part A (Re Exported Natural Gas).

[21] Though it has been argued that legislative power is a consequence of provincial natural resource ownership: David Thring, "Alberta, Oil and the Constitution" (1979) 17 Alta L. Rev. at 71; see Hughes*, supra* note 3 at 65.

[22] Though agreements cannot, without formal (and difficult) constitutional amendments, permanently alter the division of powers.

[23] Hughes, *supra* note 3 at 55.

[24] Re Exported Natural Gas, *supra* note 20.

In 1867, Canada made an acquisition that added enormously to Canadian public lands. It purchased in 1870 the lands called "Rupert's Land" that had been held by the Hudson's Bay Company under its 1670 Royal Charter.[25] In consideration, the company received 300,000 pounds and retained certain lands (along with mines and minerals) including 50,000 acres around each trading post and 2.8 million hectares amounting to one twentieth of other "fertile belt"[26] lands.

This set the stage for the second federal action that made the federal government's western settlement goals a reality, namely the land grant to the CPR for its proposed Ontario to British Columbia railway. The CPR received a grant of 25 million fertile belt acres - two 640-acre sections in each township, extending 24 miles on both sides of the proposed.[27] Most remaining railway belt land was reserved for homesteaders.

Another federal action was negotiating, between 1870 and 1921, numbered treaties with western Indigenous peoples. These addressed traditional land uses including hunting, trapping, and fishing.[28] A large jurisprudence has developed around the meaning and scope of these rights, including a free-standing right to consultation and accommodation where Aboriginal rights are likely to be affected by government action.[29]

This post-confederation context changed profoundly with the coming into force of s. 35 (2) of the *Constitution Act 1982* which provides that "existing Aboriginal and treaty rights are recognized and affirmed…"[30]

2.6 The Special Case of Western Public Land Ownership – The Natural Resources Transfer Agreements

When British Columbia and Prince Edward Island became provinces in the 1870s, their terms of union made the s.109 public property provision applicable to them in the same way it applied to the original federating provinces. However, when Manitoba joined the union in 1870, and Alberta and Saskatchewan became provinces in 1905, the federal government retained these public lands and minerals and raised revenue through sale of these resources. Not until 1930, with conclusion of the Natural Resources Transfer Agreements (NRTA),[31] which were confirmed by constitutional amendment,[32] did Alberta and Saskatchewan become owners of their public lands and natural resources.

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[25] *Ibid* at 34-36.
[26] *Ibid* at 35.
[27] *Ibid* at 37.
[28] *Ibid* at 36.
[29] See Heather Fast and Brenda Gunn, 'Indigenous Peoples' Jurisdiction over the Environment' in William Tilleman, Alastair Lucas, Sara Bagg, and Patricia Galvao Ferriera, *Environmental Law and Policy 4th Edition* (Toronto: Emond, 2020); Government of Alberta, "Guide to Applying PLAR in the context of Aboriginal Peoples' Rights, Number: AEP Public Land Management 2018 No. 6, Program Name: Public Land Policy", Effective Date: April 1, 2018, update: May 10, 2018.
[30] *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35 (2).
[31] *Natural Resources Transfer Agreements*, 1930 in Schedule 2 of *Constitution Act, 1930*, 20-21 George V, c. 26 (NRTA).
[32] *Ibid.*

3.0 A Public Land Use Under the *Public Lands Act* (PLA)

The PLA is the principal legislation that governs public lands administration and management in Alberta. Made under PLA authority is the *Public Lands Administration Regulation (PLAR),*[33] which, according to a government publication, serves as an instrument for the government to better manage the landscape to ensure activities on public lands are sustainable.[34] It complements some earlier regulations under the PLA such as *Dispositions and Fees Regulations*; *Forest Recreation Regulation*; *Castle Special Management Area; Forest Land Use Zone Regulation*; and *Unauthorized Use of land, and Recovery of Penalty Regulation*.[35] The PLAR is a provincial regulation that governs public lands administration and control but does not apply to private lands. It was issued on August 25, 2011, and came into force on September 12, 2011. According to a government publication, it was intended to provide a regulatory framework for renewable and nonrenewable natural resources, while at the same time, meeting environmental and preservation needs.[36]

In Alberta, public lands are owned by the government of Alberta and administered under the PLA; the allocation and use of public lands are clearly outlined in the Act. However, for management purposes, public land is categorized into two geographical zones, namely: the White Area and the Green Area. While the White Area is made up of densely populated Central, Southern and Peace River Areas of Alberta, and often referred to as the settled portion, the Green Area is the forested portion and comprises Northern Alberta, as well as the Mountain and Foothill areas within the province's western boundary.[37]

The White Area is designed to facilitate the promotion of Agricultural, recreational, soil, water conservation, fish and wildlife purposes. This area of public lands in Alberta has some large tracts, while other parts consist of scattered parcels. Although citizens who desire to use public land may need to consult with disposition holders, they may also need to submit a formal PLA application.[38]

In the Green Area, public land is managed to sustain watershed protection including wildlife and fisheries, recreation, timber production, oil and gas and other natural resource extraction purposes. Agricultural use is restricted to grazing where compatible with other uses, with grazing on public land in the Rocky Mountain Forest Reserve administered under the *Forest Reserves Act.*[39] Other grazing activities in the Green Area are administered under the PLA.[40] Broadly, public land management has transitioned from meeting the needs of early settlers to satisfying present day

[33] *Public Lands Administration Regulation,* Alta /187/2011 (PLAR).
[34] Government of Alberta, *supra* note 7 at 2.
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Forest Reserves Act,* RSA 2000, c F 22.
[40] Government of Alberta, *supra* note 7 at 3.

demands to strike a balance between development and preservation of public lands with long term sustainability.[41]

The Crown also owns the beds and shores of all naturally occurring streams, rivers, and lakes whether permanent or transient.[42] Permanence is influenced by the prolonged attributes of waterbodies which may include ephemeral wetlands that are frequently dry.

3.1 Public Land Management

The management of public lands in Alberta remains the sole responsibility of the Alberta Government for the benefit of all Albertans. This aims at defined use, development, and conservation of natural resources in cohesion with the needs of Albertans.[43] Such a stewardship position vests in public lands managers the responsibility of ensuring that the quality and quantity of public lands are maximally enhanced for the wellbeing and benefit of Albertans.[44] The management and administration of public lands in Alberta involves engaging the best and most suitable tools for ensuring that public lands are utilized in the most appropriate manner. Accordingly, some useful tools such as leases, licenses, permits, agreements, and conservation arrangements have been deployed to authorize the use of public land, and to also monitor such uses to ensure that the operations and development follow established standards.[45]

Public land constitutes an invaluable source of economic, social, and cultural benefits for Albertans. Hence there is need for the government to strike a balance between the expansion of economic activities in the province and the commitment to protect public interest in public lands towards environmental protection and increased social benefits.[46] One way the government can achieve this is through the disposition and sale of public lands. The PLA allows the Minster to sell some portions of public land except the Green Area, which … "is typically not sold since one of [its] primary uses… is for sustained wood production", [47] due to its reservation for wood and fiber production. However, some limited portions of the White Area can be sold subject to compliance with established resources management practices.[48]

Public lands can be sold where there is need to:

- promote agricultural expansion and some commercial, industrial and recreational uses; thus, facilitating the growth of the provincial economy;

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[41] *Ibid.*
[42] Brenda Heelan Powell, *Agricultural Lands Law, and Policy in Alberta* (Alberta: Environmental Law Centre, 2019) at 13 & 14 [Powell].
[43] Government of Alberta, *supra* note 7 at 3.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid* at 4.
[47] *Ibid.*
[48] *Ibid.*

- make land available for essential services such as public works, community, or industrial needs that benefit Albertans; and
- sustain other government programs.[49]

However, to determine whether public lands are suitable for sale or disposition, the following must be considered:

i) the importance of the sale for relevant resource value and environmental factors;
ii) whether the proposed use of the land is in conformity with provincial and municipal land use and policies; and
iii) the availability of private land for economic use or social security.[50]

When public lands are sold, efforts are made to ensure the maximum benefits of preserving environmentally sensitive features and an accrual of fair economic returns to Albertans. To achieve this, the following must be considered:

- using fair and equitable market value for land sales;
- obtaining the market value for Crown owned timber; and
- ensuring that environmentally sensitive factors are addressed, by, for example, placing restrictions on the title to protect resources from incompatible activities.[51]

To be eligible to purchase public land in Alberta, the applicant (in the case of individuals), must be a Canadian citizen; for corporations, the corporation must be registered in Canada, or must be a person or corporation acting as a trustee for someone who is a Canadian citizen or corporation. The sale can also be extended to municipalities in appropriate circumstances.[52] Consequently, to have access to public land, a disposition order must be obtained pursuant to the provisions of the PLA and PLAR. A disposition is made by an instrument executed pursuant to the Act where there is conveyance or sale of:

- any estate or interest in land of the Crown or;
- any other right or privilege in relation to the land of the Crown that is not an estate or interest in land or has not been conveyed by the Crown to any person but does not include a grant.[53]

3.2 Structure and Composition of Public Lands Under the Public Lands Act (PLA)

The PLA establishes the role of the Alberta government in maintaining public lands and sets out mechanisms through which rights in public land may be disposed of, sold, or leased. It provides

[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid* at 5.
[52] *Ibid.*
[53] PLA, *supra* note 2, s 1(e).

for and defines the powers of the Minister and the Lieutenant Governor in Council in making regulations to guide the use and allocation of public land.[54]

Under the PLA a "person responsible" in relation to the use of public land means:

- the holder of a disposition issued for public land;
- the holder of an authorization issued under the section 20 of the Act;
- any person who has or had charge, management or control of the authority or use;
- any successor, assignee, executor, administrator, receiver, receiver – manager or trustee of a person;
- a principal or agent of a person.[55]

3.3 Administration and Management

The Act provides the legislative framework for public lands administration and applies to all public lands under the provincial and administrative competence of the Minister of the Environment and Protected Areas Development.[56] The Act also applies to public lands in the administration of other ministers or Crown agencies where the Act applies. The Act:

a) empowers the Minister to designate areas of public land;[57]
b) authorizes the Minister to make regulations stipulating dispositions of interests in public lands and sets out rules to regulate specific dispositions;[58]
c) stipulates the responsible officers who administer public lands and outlines the processes for transferring administrators of areas of public lands to different ministries and agencies;[59]
d) permits the director to grant interests in, or occupation of public lands and to enter into agreements for the use of public lands;[60]
e) authorizes the Lieutenant Governor in Council to issue regulations regarding the use of public lands for exploration, development, or permitting or prohibiting the use of vacant public land resources involving dispositions and dispute resolution between disposition holders for access to public land;[61]
f) outlines limitations and regulations regarding the sale of public land and agreements involving use after sale;[62]

[54] Powell, *supra* note 41.
[55] PLA, *supra* note 2, s 1(0.1).
[56] Kwasniak, *supra* note 4 at 99.
[57] PLA, *supra* note 2, s 11(c).
[58] *Ibid*, s 28(2).
[59] *Ibid*, s 12.
[60] *Ibid*, s 20.
[61] *Ibid*, s 8.
[62] *Ibid*, ss 18 & 21.

g) prescribes offences in relation to public land use or damage to public land, and claims Crown ownership of the beds and shores of all permanent and naturally occurring bodies of the water;[63]
h) facilitates a mechanism for public land management and installs a system for reservation and notation of public lands programs;[64] and
i) provides a framework for government development of public lands policy.[65]

The PLA outlines certain dispositions of interests in public lands and stipulates the guidelines for dispositions. It uses the PLAR as a critical regulatory tool to facilitate the sale and disposition of public lands.[66] Part 4 of the Act permits a director to lease an area of public land settlement to graze about 6000 head of cattle for a term not exceeding 20 years where, in the director's opinion, the best use of the land is to put it into livestock grazing.[67] It outlines specific rules stating persons or institutions authorized to hold a grazing lease: rent, grazing capacity, withdrawals from grazing leases, and assignment and cancellation of grazing leases.[68]

The Act allows the Minister to operate community grazing reserves.[69] Consequently, the province has about 32 grazing reserves with estimated 291,000 hectares and a size of approximately 6,600 acres to about 76,681 acres.[70] It permits the Minister to grant public land to entities including the board of trustees of a school district in a rural area for use as a school site, a cemetery, a religious entity such as a church or mission, a Metis settlement, or a society for community hall.[71] The Act permits the director to authorize the occupation of land for a period of time for the conservation of natural resources.[72]

There is also provision for the appointment of an Assistant Deputy Minister, officers, and other employees necessary for the administration of the Act. The Minister may by order designate any person as a director for purposes of all or part of the Act and the regulations.[73] The Minister may personally designate any person as an acting director to act in the director's capacity in the absence of the director or inability of the director to act. A designation may direct that the authority conferred is to be exercised based on the terms and conditions prescribed in the designation.[74]

The Lieutenant Governor in Council may authorize the Minister to sell public land to a municipal corporation at a price to be determined by the Minister. Further, the Lieutenant Governor in

[63] *Ibid*, s 3.
[64] *Ibid*, s 11.
[65] *Ibid*.
[66] PLAR*, supra* note 32, s 6(2).
[67] PLA, *supra* note 2, ss 83-84.
[68] *Ibid*.
[69] *Ibid*, s 107.
[70] Kwasniak, *supra* note 4 at 112.
[71] PLA, *supra* note 2, s 19(1).
[72] *Ibid*, s 20.
[73] *Ibid*, s 1(p).
[74] *Ibid*, s 5(3) & (4).

Council may authorize the director to make any disposition or authorize the Minister to make a grant of public land in any special case for which no provision is made. The Minister may also set aside public land for use as a provincial park, industrial site, natural area, ecological reserve, wilderness area, heritage rangeland, forest reserve, recreation area, wildlife habitat, or public resort.[75]

3.4 Administration and Regulations

The Lieutenant Governor in Council may make regulations authorizing dispositions and restrictions on the use of public land. The Lieutenant Governor in Council may limit the areas in which the director may issue dispositions and prescribe conditions for the administration and subsequent disposition of public land. Regulations may also be made in relation to the rights, duties, and obligations of disposition holders, as well as to stipulate the terms for which such dispositions may be issued including their renewal.[76]

Regulations may be made prospectively or, in limited circumstances, retrospectively. Where a disposition was made pursuant to the provisions of the Act authorizing the Minister to sell public land either by public auction, private sale, or tender on terms and conditions prescribed by the Minister at a price not less than the fair market value, the Minister may consider the purposes for which the land may be used. The Lieutenant Governor in Council may also authorize the Minister to exchange public land for any other land where in the Minister's opinion, adequate compensation is obtained.[77]

The Act empowers the Lieutenant Governor in Council to make regulations prescribing the terms and conditions upon which any person may use public lands for the purpose of exploitation and permitting or prohibiting the use and occupation of public land. It also provides for means of settling disputes among holders of dispositions, applicants for dispositions, and persons who may be affected by operations under a disposition.[78]

The Minister may by order prescribe the way rent, fees, costs, and other charges are to be paid for the use and occupation or for activities on public land.[79] When a Right of Entry (ROE) order under the *Surface Rights Act* is granted to a person in relation to public land, the compensation payable to the Crown under the order will be an amount equal to the current charges payable for a mineral surface lease, notwithstanding whether the land is occupied or not.[80]

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[75] *Ibid*, s 7(a)(b)(c)(i) & (iii).
[76] *Ibid*, s 8(1)(a) (a.1) & (a.2).
[77] *Ibid*, s 8 (3)(a) & (b).
[78] *Ibid*, s 9(a) (a.1) (b.1)(i) & (ii).
[79] *Ibid*, s 9.1(a)(i) (i.1) (ii) & (iii).
[80] *Ibid*, s 10 (1).

The Act also empowers the Minister to establish the Land Stewardship Fund (LSF) for the purpose of purchasing any estate or interest in land as may be prescribed by the Act.[81] The LSF is managed by the Minister and proceeds accruing from sales of public lands are paid into the LSF; the Minister is required to maintain a separate accounting record of the LSF.[82] However, the Lieutenant Governor in Council may make regulations limiting the exercise of the Minister's discretion in administering the LSF. The Lieutenant Governor in Council may also regulate the Minister's powers in prescribing fees, levies, royalties, penalties, dues, rents, and other sums payable into the LSF and for purposes the funds may be applied.[83]

The Lieutenant Governor in Council may make regulations prescribing the limits upon the value of the LSF to be held by the Minister, require a proper accounting record for the acquisition of land by agents of the Crown, and direct that the revenue earned from deposits into the LSF accrue to and constitute part of the LSF.[84] The Minister may restrict the disposition of public land in any specified area and in a manner deemed fit, and prescribe on what conditions applications for dispositions may be made.[85] Subject to the Regulations however, the director may make and renew a disposition for any term the director considers appropriate and prescribe terms and conditions.[86] However, the director may amend a disposition at any time if in the director's opinion, the amendment is necessary for the disposition to comply with the requirements of the Act; or where the director believes the amendment is necessary to prevent the continuation or occurrence of public land damage or loss.[87]

3.5 Administration and Regulation under the *Public Lands Act* (PLA) and the *Public Lands Administration Regulation* (PLAR).

As noted above, the PLA and the PLAR are the principal legislative instruments for public lands management, administration, and control in Alberta. So, it is pertinent to examine some salient provisions of the PLAR (the Regulation).

Part 1 of the PLAR addresses the interest and duties of disposition holders. Part 2 provides for clarity of the rules governing access to public land, while part 3 deals with matters relating to dispositions as provided for under the PLA such as grazing leases, grazing licenses and permits, tax permits, cultivation, mineral surface leases, and surface material disposition, among others.[88]

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[81] *Ibid*, s 11.2(1)(2)(a) & (b).
[82] *Ibid*, s 11(3)(4) & (5).
[83] *Ibid*, s 11(6)(a)(b) &(c).
[84] *Ibid*, s 11(6)(d)(e)(f) & (g).
[85] *Ibid*, s 14(a) & (b).
[86] *Ibid*, s 15(1)(2).
[87] *Ibid*, s 15(3)(a)(b) & (c).
[88] Kwasniak, *supra* note 4 at 112-115.

PLAR allows the holder of a grazing license to graze livestock in an area of public land while considering that other right holders may use the area for other purposes such as timber operations.[89] Short term tax permits may also be issued to allow holders to pasture livestock in grazing reserves.[90] The director may order a bison approval permitting the grazing of bison on some or all parts of a grazing disposition. Licenses for occupation may be issued for diverse purposes including the construction and maintenance of roads over public lands. The director reserves the right to withdraw any land from a licensed area without payment of compensation subject to the issuance of a notice.[91]

The Regulation authorizes the Minister to issue mineral surface leases to producers in respect of operations on public land.[92] The director is also authorized to issue surface material licenses for preparing and stripping overburden; one year licenses or a 25 year lease may be issued.[93] The director may grant leases for pipeline easements and facilities so that the operator is allowed to access the easement area notwithstanding that the access path is under disposition pursuant to the PLA.[94] The Regulation allows dispositions relating to commercial trail riding business for 1 year, and allows a base camp lease for a period not exceeding 5 years.[95] It authorizes the Minister to establish certain dispositions such as a lease, permit, right of way agreement and a mortgage in relation to public land for purposes the PLA and the PLAR did not specifically provide for. Such a disposition must not exceed 25 years.[96]

Part 4 of PLAR covers dispositions relating to subleases and transfers. Parts 5 and 6 relate to reinstatement of dispositions, and monitoring and compliance. While part 7 addresses issues relating to Access to Information, part 8 deals with enforcement provisions in the PLA, and part 9 outlines the rights and processes of appeals.[97] The schedule of the Regulation contains information describing the land such as bison grazing.

Both the PLA and the PLAR empower public land administrators to address a range of offences; such as accumulation of waste materials creating damage or loss of public land.[98] The PLA also makes it an offence for a person to occupy public land without an authorization or disposition to do so, to willfully remove any property belonging to the government from public land, or to

[89] PLAR, *supra* note 32, ss 62-63.
[90] *Ibid*, ss 70-71.
[91] *Ibid*, ss 91-99.
[92] *Ibid*, ss 101-104.
[93] *Ibid*, ss 105-120.
[94] *Ibid*, ss 121-131.
[95] *Ibid*, ss 132-143.
[96] *Ibid*, ss 144-145.
[97] Kwasniak, *supra* note 4 at 115-116.
[98] PLA, *supra* note 2, s 54(1).

contravene any provision of the Act or the Regulation.[99] Further provisions relating to the prohibition of unauthorized use of public land are contained in the PLAR.[100]

4.0 Public Lands Policy – Overall Management Approach

The Alberta government has implemented an overall public land management approach that it characterizes as Integrated Resource Management (IRM).[101] This system is described as:

"…manag[ing] and monitor[ing] natural resource and environmental assets over larger areas beyond a project-by-project basis. Using the Integrated Resource Management (IRM) system supports management of multiple resources and land uses in an area to achieve environmental, economic, and social objectives".

There is also reference to, "sustainable use of land, and responsible resource stewardship". Attention is given to "cumulative effects", described as, "the combined effects of past, present and foreseeable land use over time on the environment". The explanation is:

"Cumulative effects management considers environmental, economic, and social (including cultural) factors in land-use decisions. The government follows a "plan-do-check" approach to setting, meeting, and evaluating place-based outcomes. Having the best possible information to regularly assess performance allows us to change our approaches as necessary to ensure objectives are achieved."

4.1 What is Ecosystem Management?

Ecosystem management is an alternative public land management approach. It is a combination of operational principles and guidelines for managing human activities to coexist with ecological processes over a period; it is a set of principles, policy objectives and management values for ecosystem management.[102] The primary aim of ecosystem management is to protect critical ecological components to sustain land resources in the long term.[103]

Because the concept of ecosystem management is still evolving, it defies a precise definition among scholars. As a scientific notion, it encompasses biological organisms in each habitat to create a synergy in the environment.[104] It focuses on how natural resources can be managed over

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[99] *Ibid*, s 56(1).
[100] PLAR*, supra note* 32, s 174.
[101] See Government of Alberta, "Describing the ILM Approach" 2010 Online: Describing the integrated land management approach - Open Government (alberta.ca).
[102] Steven Kennett, *New Directions for Public Land Law*, CIRL Occasional Paper #4 (Calgary Canadian Institute of Resources Law, at 19 (Kennett).
[103] *Ibid* at 19-20.
[104] *Ibid* at 17.

a period with limited human intervention, and considers how the security of land resources, ownership and economic practices can be based on human values.[105]

4.2 The Role of Planning

Land use planning has continued to play an enormous role in public land management both in Canada and the United States. Some provincial governments in Canada have utilized it as an instrument to address land use conflicts within their territories.[106] The sustainable use of public land and resources can be made effective in Alberta by incorporating core values for public land management into a normative framework tailored towards guiding decision-making. Planning is an important tool designed to facilitate ecosystem viability and balance multiple uses; it is a strategy that focuses on long-term sustainability of land and resource uses, and community stability.[107]

4.2.1 Planning Processes

A comprehensive planning process can provide blueprints that permit decisions on land use based on values that reflect ecological sustainability. A transparent planning process can mitigate the risk of arbitrariness rooted in public land management.[108] Apart from preventing the shortcomings of cumulative impacts on biodiversity, planning has made it feasible to adopt proactive measures in protecting wildlife habitat and endangered species.[109]

While fostering the key objectives of ecosystem management, planning promotes the sustainability of renewable resource use towards maintaining the value of vast landscapes. To achieve these goals, planning should be designed to integrate decision making that reflects ecosystem management considerations.[110]

Another crucial benefit of planning is that it lays a foundation for better decision-making and provides a mechanism for systemic data collection that ensures adequate information is channeled to guide management choices.[111] A thorough planning process broadens the frontiers of public land management and mitigates pressures from interest groups who may have objectives capable of hampering proper policy implementation. Transparent and well-structured planning has the potential for addressing issues related to political and administrative decision-making on public land projects.[112]

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[105] *Ibid* at 17.
[106] Nigel Richardson, *Land use Planning and Sustainable Development in Canada*, in Steven Kennett, *supra* note 101 at 23.
[107] Kennett, *supra* note 101 at 25.
[108] *Ibid.*
[109] *Ibid* at 26.
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid* at 27.

Apart from promoting the potential of public land management, planning ensures that management activities are not arbitrarily influenced by political considerations. Although the goal is not to render public land vulnerable to dynamic circumstances, it facilitates a predictable process that considers public participation as a critical component of influencing changes in public land administration.[113] Predictability affords interested parties the opportunity to develop probable expectations in preserving permitted uses in designated areas. It also allows project proponents to make predictions regarding regulatory approvals as well as the terms and conditions that may likely be imposed. Planning also mitigates the uncertainty that characterizes the handling of specific regulatory developments and the likelihood of arbitrary policy changes in land use management.[114]

For planning to remain an important tool for effective public land management, the following must be considered:

- those responsible for managing public land and resources, should adopt an integrated planning structure that is consistent with related processes;
- the core objectives to be achieved through planning and the process in the final plan, must be considered;
- the procedural principles of planning designed to facilitate a transparent and fair process, must be implemented; and
- the legal status of the land use plans that arises from that process, must also be considered.[115]

Ascribing land use plans a legal status requires a balance between flexibility and certainty. The need to strike this balance exposes the tension between a viable approach dynamic enough to sustain public values, and the risk of unfettered administrative discretion. Striking this balance requires some level of planning and implementation.[116] Thus, for planning to be effective, it must be legally enforceable to curtail administrative interference and undue exercise of discretion by land managers.[117]

Apart from minimizing the risk of administrative ineffectiveness in land use and resource management, there is need for proper integration. On this basis, achieving a strategic integration in the decision-making process includes:

- establishing broad policy directions, principle and standards;
- land use planning and dispositions;
- granting private interests on public lands; and

[113] *Ibid.*
[114] *Ibid* at 28.
[115] *Ibid* at 30.
[116] *Ibid.*
[117] *Ibid* at 31.

- environmental assessment and regulation.[118]

Achieving feasible integration requires proper structure with institutional arrangements tailored towards sustaining the desired result in land and resource management.[119]

4.2.2 The *Alberta Land Stewardship Act*

Alberta's *Land Stewardship Act* (ALSA)[120] with its companion Land Use Framework[121] was heralded in the late 2000s as a revolutionary approach to rationalizing and reconciling public land and resource management, and project specific planning and regulation on these lands.[122] It is statute based, going beyond mere administrative, Ministry-initiated processes. The core ALSA process is development and cabinet approval of regional plans for seven major river basins in the province.[123] The plans bind the Crown[124] and prevail over "conflicting provisions"[125] of Alberta regulations, "regulatory instruments" including municipal bylaws, and government policies and codes of practice. Further, they may, with certain exceptions, affect "statutory consents" - dispositions, permits, and licences issued under other provincial statutes or regulations.[126]

The ALSA also confirms and creates or authorizes a group of conservation or stewardship tools including conservation easements, conservation directives, conservation offsets, and an economic instrument involving transfer of development credits (TDC).

Two regional plans have been completed: the Lower Athabasca, which includes the oil sands region, and the South Saskatchewan. These, particularly the former, include or make provision for assessment, monitoring, and establishment of ecological component threshold quality levels. Development of a North Saskatchewan regional plan was initiated. However, the basin planning processes stalled, and remains in abeyance.

5.0 Project Specific Regulation of Natural Resource Activities on Public Land

5.1 Dispositions, Permits and Approvals

Generally, the use of public land in Alberta is governed by the *Public Lands Act*. This includes dispositions for grazing and other agricultural uses, as well as a range of other uses. Licences of occupation and use of public lands may also be issued.

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[118] *Ibid* at 32.
[119] *Ibid* at 36.
[120] *Alberta Land Stewardship Act*, SA 2009 c A 26.8. [ALSA].
[121] Alberta Land Use Framework, online: Land-use Framework Home Alberta - Land-use Framework.
[122] Steven Kennett, *Change to Believe in: a Legal Checklist for Alberta's Land-use Framework*, (2009) 104 *Resources* (Calgary: Canadian Institute of Resources Law).
[123] ALSA, *supra* note 119, Part 1, Regional Plans, ss 3-11
[124] *Ibid*, s 15.
[125] *Ibid*, s 17.
[126] *Ibid*, s 11.

Other uses, including forestry, water, parks, and oil and gas have their own statutory regimes. Mines and minerals are excepted unless it is clearly stated otherwise in sales and dispositions.[127]

5.1.1 Director's Powers

Authorized decision makers, particularly directors, are empowered to issue dispositions and licences, and to attach terms and conditions to land use and facilities' approvals, concerning such matters as materials, standards, operations, monitoring, and reporting.[128] Director's powers also include making[129]:

- Corrections
- Cancellations, in specified circumstances
- Suspensions, in specified circumstances
- Amendments, in specified circumstances
- Enforcement orders
- Stop orders
- Administrative monetary penalties

The legal nature of these Director decisions is a large and complex field. The basics are reviewed in the sections below on enforcement and compliance (s. 5.4) and appeals (s. 5.5).

5.2 Impact Assessment of PLA Dispositions

5.2.1 Impact Assessment

Impact assessment (IA) is intended to review and identify potentially adverse environmental, economic, and social impacts of major proposed projects. It represents the first step in regulatory decisions concerning natural resources including public lands. The idea is that IA is anticipatory, designed to reveal potential adverse impacts, how these might be mitigated, and ultimately in light of assessments, whether or not projects are in the public interest. Alberta has an IA process under the *Environmental Protection and Enhancement Act* (EPEA). The EPEA IA process, depending on project size and description, can also be an element of energy, water, and forestry projects.[130]

There are both provincial and federal IA processes. They apply to listed projects and actions that are within respective provincial and federal constitutional jurisdiction. An Alberta reference case in mid-2023 questioned the constitutional validity of the federal *Impact Assessment Act* (IAA). The Alberta Court of Appeal held the statute unconstitutional as encroaching on provincial jurisdiction in relation to "property and civil rights" in the province, "management of nonrenewable natural resources and electricity generating sites in the province, and "management

[127] PLA, *supra* note 2, s 35 (1).
[128] *Ibid*, s 15(2).
[129] *Ibid*, ss 15 (3), 24-28, 59.1-59.7.
[130] See *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 Part 2. (EPEA).

and sale of the public lands belonging to the province". On appeal the Supreme Court of Canada held the designated project core of the IAA unconstitutional as "not in pith and substance directed at regulating "effects within federal jurisdiction" as defined in the IAA because these effects do not drive the scheme's decision- making functions, and the defined term "effects within federal jurisdiction" does not align with federal legislative jurisdiction". This means that federal environmental assessment authority is limited essentially to assessment of projects concerning works or undertakings, even if within provinces, that involve impacts on federal constitutional subject matters including First Nations lands, fisheries, navigation and shipping, and migratory birds.[131]

5.2.2 Environmental Assessment (EA) of PLA Dispositions and other Approvals

Formal EA of proposed public lands initiatives, apart from energy projects in the Alberta Energy Regulator process, is exceptional. There are even examples in the past of special public inquiries being established to assess major forestry projects.[132] Otherwise, the Alberta Ministerial Pre-Application Requirements for Formal Dispositions,[133] document is crucial in setting out required information for review and assessment of proposed dispositions. Included are:

- identification of impacted disposition and other stakeholders, and their consents;
- First Nations and Metis Settlement consultation;
- project footprint;
- resource values identification and protection;
- water bodies, watersheds, and wetlands identification and consideration;
- access coordination and management;
- reservations and notifications identification and clearance;
- Higher Level Plans, such as ALSA Regional Plans, and Integrated Resource Plans, identification and consideration, and;
- species at risk identification.

This process, guided by the principles of Integrated Resource Management, is stated to:

"… require that applicants plan activities in a manner that considers the needs of all resources and resource uses/users on the land base. This approach ensures environmental impacts are minimized and orderly resource development".[134]

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[131] *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 98-101 and 133.
[132] See Daniel Farr, Steve Kennett, Monique M. Ross, Brad Stelfox, and Marian Weber, "Al-Pac Case Study Report – Part 2 Regulatory Barriers and Options", Prepared for the National Round Table on the Environment and the Economy, July 2004, Online: Microsoft Word - AlPac-Case-Study-Part-2_E.doc (cirl.ca)
[133] Alberta Environment and Protected Areas, Pre-Application Requirements for Formal Dispositions (2019) at 33 aep-pre-application-requirements-for-formal-dispositions.pdf (alberta.ca) (Pre-application).
[134] *Ibid,* at 11.

Applicants must submit a "Land Standing Report"[135] that incorporates the above information as well as consents of affected disposition holders, and information on reservations and notifications,[136] a species at risk survey, and water and wetland setbacks.

5.3 Public Participation and Involvement

Broad public participation may be authorized and encouraged where public lands or natural resource management agencies such as the Alberta Energy Regulator or Alberta Environment and Protected Areas in watershed planning as under ALSA, (section 4.4.2 above) establish public comment processes on specific issues. Another example is the Agricultural Lease Review Committee of the late 1990s which was charged with investigating and reporting to government on public lands issues, particularly grazing and other agricultural leases, and conflicting recreational uses.[137] Provision is also made for public participation in the impact assessment processes.[138]

Informal hearings may be held.[139] Otherwise, a hearing or other public engagement is not normally held for public lands dispositions or permits under the PLA; though administrative guidelines require First Nations and Metis Settlement consultation.[140]

5.4 Enforcement

The PLA establishes a range of offences[141] including damage to or removal of public property; occupation of public land without disposition or approval; failure to comply with disposition conditions, Directors' enforcement or stop orders; and, generally, failure to comply with any provision of the Act or Regulations. An important example is unauthorized use of roads or trails.[142] There is also provision for administrative monetary penalties.[143] Upon conviction, courts have broad powers to make orders requiring offenders to take appropriate actions.[144]

Exemptions authorize specific forms of recreational access to public lands under agricultural dispositions. Disposition holders are required to allow "reasonable access" to recreationists.[145]

5.5 Appeals

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134 *Ibid* at 12.
136 *Ibid,* at 12-14.
137 Hughes, *supra* note 3 at 164.
138 EPEA, *supra* note 129 Part 2.
139 See Pre-application *supra* note 132.
140 *Ibid* at 33.
141 PLA, *supra* note 2, s 56 (1).
142 *Ibid*, s 54 (1).
143 *Ibid*, s 59.3.
144 *Ibid*, s 59.1.
145 *Ibid, s* 62.1; *Recreational Access Regulation*, Alta Reg 228/2003, s 8; see *infra*, section 6.2.

Appeals from a range of PLA decisions including dispositions and related conditions enforcement are provided under Part 7 of the Act. This means that certain decisions not included in the Act such as a decision to exclude a person from public land, cannot be appealed.[146]

The Public Lands Appeal Board (PLAB) has been integrated administratively with the Alberta Environmental Appeals Board. There are still two separate boards, but individual members are appointed to both boards, and staff may serve both tribunals.

Relatively straightforward guidelines are provided online for Notices of Appeal and Notices of Representation.[147] "Valid grounds", indicated for appeals are that the decision maker, Director, or Officer,

- "erred in law in the determination of a material fact on the face of the record;
- erred in law;
- exceeded the Director's or Officer's jurisdiction or authority; or
- did not comply with a regional plan approved under the authority of the *Alberta Land Stewardship Act.*"[148]

It is significant that under section 124 (1) of the PLA, PLAB "decisions" are recommendations to the Minister. The Minister may then confirm, reverse, or vary the Board's decision and "immediately" give notice to the Board and to persons concerned with the decision. An example is *NE Bulk Transport Services,*[149] where the Minister reversed the Board's denial of a 10-year surface mineral lease on the ground that in the circumstances, the director had no authority to remove a protective notification concerning a proposed provincial park.

Certain types of Director's disposition holder or applicant decisions or actions show up several times in the PLAB decision list. These are:

1. Unauthorized subleasing;
2. Administrative monetary penalties (AMPs). These can be significant sometimes exceeding $1/2 million in total. The Director can award AMPs according to a statutory scale, and add substantial economic gain repayment requirements;[150] and
3. Procedural fairness, particularly notice, and opportunity to be heard.

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[146] See *Robert Rettie, Aqua Properties Ltd. v. Director, Environment and Protected Areas*, 2023 ABPLAB 14 (CanLII), <https://canlii.ca/t/k05x7>, retrieved on 2023-09-20.
[147] Pages - Alberta Public Lands Appeal Board (forms that include deadlines and examples of valid grounds of appeal, accessed August 17, 2023).
[148] Alberta Public Lands Appeal Board, Notice of Appeal Form. Online: adminesrd0007 (5).pdf
[149] *Northeast Bulk Transportation Services Ltd.* v. *Director, Aggregate Assessments and Continuations*, *Alberta Environment and Parks* (5 June 2020), Appeal No. 19-0004-R (A.P.L.A.B.), 2020 ABPLAB 9.
[150] E.g., *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 July 2020), Appeal Nos. 19-0005-0006-R (A.P.L.A.B.), 2020 ABPLAB 12 (total AMP $ 410,597, including proceeds amount of $390,597).

5.6 Judicial Review

This involves judicial proceedings to challenge the validity and procedural fairness of decisions of the PLAB. It includes procedural fairness, substantive errors, or both. The substantive category has become more complex since the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov.*[151]

The Alberta Court of Appeal suggested in *Normtek Radiation Services Ltd. v Alberta Environmental Appeals Board*, concerning a decision of the analogous Alberta Environmental Appeals Board, that the standard of review should be reasonableness, an approach that requires decisions to be justified, transparent, and intelligible.[152] However, shortly thereafter, the Supreme Court of Canada in *Vavilov*[153] stated that the standard of review for statutory appeal bodies, like the PLAB, will presumptively be more intrusive (less deferential) "correctness".[154]

6.0 Notable Public Land Use Conflicts Under the PLA

These are public land use conflicts selected on the basis of past and potential public interest and concern in Alberta, while excluding the unmanageably large oil and gas and water areas. These merit their own public guides. Some oil and gas issues under federal constitutional jurisdiction are addressed by CIRL's *A Guide to the Canada Energy Regulator*.[155]

6.1 First Nations Traditional Use

The starting point is that Indigenous peoples' rights and title in relation to public lands are recognized and affirmed by section 35 of the *Constitution Act 1982*.[156] The Aboriginal title part refers to a form of Aboriginal right to the land itself as opposed to land use rights including hunting, fishing, trapping, and ceremonial activities.[157] All of these are rights, based on Indigenous peoples' historic occupation of Canada, have been recognized and defined by judicial process.[158] There is a large and rapidly developing jurisprudence.[159] The conflict pits these Aboriginal rights against provincial public property rights (section 2.3.2 above), as extended to the prairie provinces by the

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[151] 2019 SCC 65 (Vavilov).
[152] *Normtek Radiation Services Ltd. v Alberta Environmental Appeals Board*, 2020 ABCA 456 at para 128-129, 131. EPEA requires that EAB appellants be "directly and adversely affected", whereas the PLA refers to "directly affected". However, the Alberta Court of Appeal in *Normtek* concluded at para 79 that "directly affected" "connotes "directly affected in an adverse manner".
[153] *Vavilov*, *supra* note 150.
[154] *Ibid*, para 36-41.
[155] Alastair R. Lucas, *A Guide to the Canada Energy Regulator*, CIRL Occasional Paper # 78, May 2022. On line: Occasional Paper #78.pdf (cirl.ca).
[156] *Constitution Act* 1982, s 35 (2). See *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.
[156] See *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 20 ff.
[158] *Haida Nation v. British Columbia (Minister of Forests) supra* note 155*; Tsilhqot'in Nation, ibid.*
[159] See Heather Fast and Brenda Gunn, *Indigenous Peoples' Jurisdiction over the Environment*, in William Tilleman, Alastair Lucas, Sara Bagg, and Patricia Galvao Ferriera, *Environmental Law and Policy 4th Edition* (Toronto: Emond, 2020) at 324-326.

Natural Resources Transfer Agreements (NRTA),[160] as well as provincial public lands and wildlife legislative jurisdiction (particularly the PLA and the *Alberta Wildlife Act*).

Aboriginal title cannot be held by individuals and is inalienable except to the Crown. It is a "burden" on the Crown's underlying title to Crown lands that has not been "surrendered" to the Crown through treaties (including for reserves) or other processes. Aboriginal rights to use land include the practices and traditions of Indigenous groups prior to European contact. The conflicts concern the intersection of these Aboriginal original and reserved rights and the constitutionally based provincial and federal land ownership under section 109 of the *Constitution Act 1867* (BNA Act) and the NRTA. Also significant is federal legislative authority in relation to "…lands reserved for the Indians" under section 91 (24) of the *Constitution Act 1867*.

The Supreme Court of Canada's 1996 decision in *R. v. Badger*[161] illustrates these conflicts, with particular focus on the NRTA, that was given constitutional status by the BNA Act 1930. Wayne Badger and two other Treaty 8[162] members, Leroy Kiyawasew and Ernest Ominayak, hunted moose on private lands without licences, contrary to the *Alberta Wildlife Act*. Badger's two colleagues saw barns and barely readable signs, visible evidence that the land was being used. However, Ominayak saw no evidence of land use where he hunted. Only Badger and Kiyawasew were convicted.

All relied on Treaty 8, which provides:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they **shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described,** subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[163]

The accused maintained that their Treaty 8 rights were not extinguished. However, the Crown argued that this Treaty 8 provision was modified by section 12 of the NRTA which provides only for food hunting, thus extinguishing the Treaty 8 right which could encompass unextinguished rights to commercial hunting. Section 12 of the NRTA is as follows:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that **the said Indians shall have the right, which the Province hereby assures to them,**

[160] Constitutionalized as *Constitution Act 1930*, 20-21 Geo V, c 26 (UK).
[161] [1996] SCR 771.
[162] Made 21 June 1899.
[163] Emphasis added.

of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[164]

The Court held that a right to hunt for food was continued; however, there is no treaty right to hunt – a visible incompatible use – on occupied land. Thus, only Ominayak was entitled to exercise the right to hunt for food on that particular land. Though this case concerned private land, the court's interpretive conclusions should be equally applicable to public land.

6.2 Recreational Access

The *Recreational Access Regulation*[165] under the *Public Lands Act* includes a list of recreational activities permitted on public lands subject to an agricultural disposition, meaning a grazing lease, licence, or permit, farm development lease, cultivation permit, or an authorization to harvest hay. These are:[166]

(i) hunting within the meaning of the *Wildlife Act*;

(ii) camping;

(iii) fishing;

(iv) boating, swimming and other water sports;

(v) berry picking, mushroom picking and picking of other fruits or herbs;

(vi) picnicking;

(vii) hiking;

(viii) nature study and viewing or photographing scenic sites;

(ix) snow skiing, snowshoeing, skating, sledding and other winter sports;

(x) hang-gliding;

(xi) hot air ballooning;

(xii) bicycling;

(xiii) the use of animals for transportation;

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[164] NRTA, *supra* note 30, Emphasis added.
[165] *Recreational Access Regulation,* Alta Reg 228/2003.
[166] *Ibid*, Definitions, s 1 (j).

(xiv) the use of motor vehicles.

The disposition holder must be contacted and must be reasonably available for contact.

6.3 Recreational Hunting

Recreational hunting on grazing leases and other agricultural dispositions has been a long running subject of conflict. This boiled over in the mid-1990s with the Court of King's Bench decision in *OH Ranch v. Patton*,[167] in which the Ranch sought a prohibitory injunction against Patton, who affirmed his intent to continue hunting on the Ranch's PLA grazing lease.

The court characterized the grazing lease as "profit a prendre" property interest, analogous to a Crown public lands oil and gas lease.[168] This gave the Ranch the control and management of the grazing lands necessary to fulfil its obligations under the grazing lease. An exclusionary injunction was ordered, "*except*", as the court specified, "*with the express written consent of the plaintiff*".[169]

This intensified public concern led in 2003 to a leaseholder contact and consent process being built into the *Recreational Access Regulation*.[170] The leaseholder must grant access unless listed circumstances exist, including proposed recreational use within fenced pasture or on cultivated land.[171]

6.4 Grazing Versus Forestry Dispositions

A classic set of public lands conflicts is between grazing lessors and holders of forest tenures under the Alberta *Forests Act*.[172] An example is *Bar C Ranch and Cattle Company v. Red Rock Sawmills Ltd.*[173] Though these proceedings focused only on injunctive relief for Bar C, it illustrates this kind of public lands conflict. The ranch had a grazing lease-based cattle operation, plus a permitted commercial trail riding business on public land. Red Rock cut timber on part of the same public lands and planned continued cutting. Inevitably, the ranch and logging company operations came into conflict. Bar C started an action to prevent further cutting and on appeal to the Court of Appeal, obtained an interim injunction. The next step was proceedings in the trial court for a final injunction.

The court applied the basic mandatory injunction "tripartite test":[174] 1. serious issue to be tried, 2. irreparable harm, and 3. balance of convenience (which party could potentially suffer greater

[167] 1995 CanLII 91867 (ABKB).
[168] *Ibid* at para 3.
[169] *Ibid* at para 9, Court's emphasis.
[170] *Supra*, note 164, at ss 5-6.
[171] *Ibid*, s. 6.
[172] RSA 2000 c F-22.
[173] 2008 ABQB 29.
[174] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

harm?). The court held that there was a serious issue based on evidence that though the grazing lease contemplated some logging, there was evidence that the ranch was not adequately consulted before logging began. Evidence that logging was already over 70% complete confirmed that there was significant irreparable removal of the forest resource. Finally, evidence indicated that the value of the timber cut prior to the initial temporary injunction was $730,000 so that Red Rock would suffer little or no loss. In the result, Bar C was granted a permanent injunction.

6.5 Migratory Birds and Species at Risk

Generally, constitutional jurisdiction over wildlife on public lands, which includes wildlife, is based on land ownership and property rights. In provinces, this means primary provincial property jurisdiction; but there are several significant federal subject matters, including wildlife in national parks, other federal lands, and areas protected under the *Canada Wildlife Act.*[175] Also included are treaty protected migratory birds, species at risk, and international transport and trade in endangered species.[176]

The migratory birds power is based on a 1916 Great Britain, on behalf of Canada, treaty with the US,[177] now updated to include Mexico and implemented by a federal statute, the *Migratory Birds Convention Act 1994*[178] (MBCA). Constitutional jurisdiction derives from the now spent empire treaty power under section 132 of the British North America Act.

In 2009, oil sands producer Syncrude was charged under the Alberta *Environmental Protection and Enhancement Act* with failing to store a hazardous substance (bitumen tailings) so it would not come into contact with animals, and under the MBCA for depositing a substance harmful to migratory birds in an area frequented by migratory birds. The court rejected the defense of due diligence, finding that the company failed to take reasonable steps to deter waterfowl from landing on its tailings pond and becoming contaminated. It found Syncrude guilty under both the provincial and federal Acts and imposed a substantial fine.[179]

7.0 Conclusions

- Public lands have significant current importance, comprising 60% of Alberta, and almost 90% of Canada's total lands.
- Indigenous rights and title to public lands have been significant in Canada's early history.
- The Constitution, particularly section 109 of the *Constitution Act 1867,* is critical in federal-provincial allocation of public lands, though a range of section 91 and 92 federal and provincial legislative powers also affect public lands.

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[175] RSC 1985 c W-9, ss 3 and 9.
[176] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, 12 ILM 1085.
[177] Originally, Convention between the United States and Great Britain for the Protection of Migratory Birds, 16 August 1916, 39 US Stat 1702, TIAS No 628.
[178] SC 1994 c 22.
[179] *R v Syncrude Canada Ltd*., 2010 ABPC 229.

- There is a sophisticated Alberta public lands planning, sale and management regime centered on the *Public Lands Act* and the *Public Lands Administration Regulation.*
- There is continuing tension between Integrated Resource Management and ecological integrity-based public land management approaches.
- A wide range of *Public lands Act* and regulations decisions may be appealed to the Public Lands Appeal Board. Board decisions may be subject to Court of Kings Bench review on a relatively intrusive "correctness" standard that involves lower order deference to decision makers.
- Examples of public lands legal issues include: First Nations land and traditional use of public lands; recreational access including recreational hunting vs grazing and agriculture; grazing vs forestry conflicts; and migratory birds and species at risk protection.

Further Readings

Steven Kennett, *New Directions for Public Land Law*, CIRL Occasional Paper #4 (Calgary: Canadian Institute of Resources Law, 1998)

Elaine Hughes, Arlene Kwasniak, and Alastair Lucas, *Public Lands and Resources Law in Canada*, (Toronto: Irwin Law, 2016)

Arlene Kwasniak, *A Legal Guide to Non-Private Lands in Alberta,* (Calgary: Canadian Institute of Resources Law, 2015

GEORGE COGGINS and Charles Wilkinson, *Federal Public Land and Resources Law*, 8th ed (United States: Foundation Press, 2021).

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